SEPTEMBER-OCTOBER 1948

6

Case and Comment

The Lawyers' Magazine—Established 1894

IN THIS ISSUE

Volume 53 **No. 5**

Unauthorized Practice by Accountants

(New York County Lawyers Association v. Bercu)

In the matter of the application of NEW YORK COUNTY LAWYERS ASSOCIATION, petitioner-appellant, to punish for contempt and to enjoin the unlawful practice of the law by BERNARD BERCU, respondent.

Decided April 12, 1948. Appellate Division, First Department

PECK, P. J.—The New York County Lawyers Association brought this proceeding to punish respondent for contempt and to enjoin him from pursuing certain activities which petitioner claims constitute the practice of law. The substantive question is whether the professional practice in which respondent is admittedly engaged constitutes the practice of law. A preliminary procedural question is whether the substantive question may be entertained and determined by the court in this summary proceeding.

Petitioner contends that respondent, an accountant, has engaged in the unlawful practice of law in giving tax advice to clients, and that, as the facts are not disputed, respondent may summarily be punished for contempt of court and enjoined. Respondent contends that the advice given was in the nature of an accounting service, rather than a legal service, and that, in any event, his activity outside of court may not be regarded or treated as a contempt of court, and may not be made the subject matter of an injunction except through an action brought under Article 75-A of the Civil Practice Act, which would require petitioner to make written request of the Attorney-General to bring the action. Such request was not made. Respondent therefore contends the proceeding may not be maintained.

The learned justice at Special Term concluded that so far as injunctive relief was concerned petitioner was under disability to proceed, because it had failed to observe the requirement of Article 75-A of giving notice to the Attorney-General, but that the proceeding might be maintained as one to punish for criminal contempt under section 750 (7) of the Judiciary Law. On the substantive question the court held that respondent's activity lay within the proper scope of the accounting profession, and therefore did not con-

stitute the unlawful practice of law.

We will deal with the procedural point first. To practice law *in any manner*, unless one be duly and regularly licensed and admitted to practice law, is a violation of section 270 of the Penal Law, and it has been determined that giving legal advice outside of court is a violation of that statute (People v. Alfani, 227 NY 334). Three procedural routes are available for enforcing the statute. One is by criminal prosecution; another is by action for an injunction under Article 75-A of the Civil Practice Act, and a third is by summary proceeding under sections 90(2) and 750(7) of the Judiciary Law. Said sections of the Judiciary Law were enacted together in 1937, the one giving the Supreme Court power and control over all persons practicing or assuming to practice law, and the other giving the Supreme Court power to punish for criminal contempt any person who unlawfully practices or assumes to practice law, and providing that a proceeding under that section may be instituted by any Bar association incorporated under the laws of this state. As it has also been determined that a contempt proceeding may be employed to punish an unlawful practice of law outside of court (Matter of N. Y. County Lawyers Ass'n v. Cool, 268 App Div 901, aff'd 294 NY 853), Special Term properly held in this case that the proceeding was properly instituted by petitioner and that respondent was not entitled to a dismissal.

As to the injunction aspect of the proceeding, we think that the case may not be regarded as an action for an injunction, because we agree with Special Term that such an action would be subject to the limitation of Article 75-A of the Civil Practice Act, requiring a request of the Attorney-General to bring the action before it might be instituted by a Bar association. We believe, however, that an injunction to the extent appropriate may be issued as part of the remedy in a summary proceeding (In re Dawkins, 262 App Div 56, aff'd 289 NY 553). We find nothing inconsistent with Article 75-A in the use of an injunction as an instrument of enforcement in such a proceeding. Article 75-A provides a method for trying out a question of alleged unlawful practice of law, the object of which is to obtain an injunction, where disputed issues of fact require a trial. The article, for example, provides for an examination before trial in such an action. It would seem that the limitation of the article is not upon the issuance of an injunction as a remedy, but rather upon the institution of the kind of an action which the article contemplates. Where an action is not necessary, as where the

facts are undisputed, a summary proceeding may be simpler, more expeditious and more appropriate than either a criminal prosecution or civil action. Where such a proceeding is available and appropriate, we do not regard the limitation in Article 75-A as a limitation upon the court in determining the remedy to be employed in enforcing its mandate. It is of some significance that sections 90(2) and 750(7) of the Judiciary Law were enacted after Article 75-A of the Civil Practice Act. If the court may punish a contempt by fine or imprisonment, it certainly should be able to employ the lesser and more salutary remedy of injunction.

We come, therefore, to the substantive question. Respondent is an accountant. He gave certain advice to the Croft Company on a tax question. He was not the auditor for the company, nor did he do any work of any kind on the books of the company. He did not prepare the tax return. The question on which he gave advice arose as follows: The City of New York had claims against the Croft Company for retail sales taxes and compensating use taxes attributable to business done in the years 1936, 1937 and 1938. The claims had not been paid in those years, in which the company had no taxable profits. In 1943 the company made large profits, which would require it to pay a minimum of 80 per cent federal tax on its net profits. It seemed advantageous to the company, therefore, to settle the city tax claims for the prior years in the year 1943 if a deduction for the payment could be taken on the federal income tax return for 1943. The company was thus considering compromising the city's claims if it was legal for the company to deduct the payment as an expense in 1943, rather than attribute the expense to the years in which the claims accrued.

The Croft Company kept its books on an accrual basis. The company's regular accountant, who was also a lawyer, had given his opinion, based on a decision of the United States Supreme Court, that any such payment would have to be charged back to the years in which the tax obligations were incurred. The president of the company consulted respondent, wanting to know why payment was not properly deductible in the year in which made. Respondent testified: "As an accountant, I said, 'No,' and he said he could not understand as a businessman why it was not deductible, and he wanted my advice based on what I know of the tax law."

Respondent had several conferences with the president of the company and/or the company's accountant-lawyer. He first stated that he was confident that there was a case similar to the Croft case and in its favor, and that he would make his own research on the subject. There-

after he made a study of the reported decisions on the subject, examining a score or more of the hundreds of cases on the question, and found a Treasury decision which in his view supported the position the Croft Company wished to take. Respondent then addressed the following letter to the Croft Company:

"August 21, 1943

"Mr. Joseph C. Bancroft
Croft Steel Products, Inc.
370 Lexington Avenue
New York, N. Y.

Dear Sir:

You will recall our conference of Friday last, when we discussed the question as to the year in which a New York City sales tax, assessed upon your company and payable in 1943, is properly deductible by your company on its Federal tax returns.

At that conference, Mr. Jacques Levy contended that under the general rule laid down by the U. S. Supreme Court, a sales tax which accrued in prior years is properly deductible only in those years, since the books of your company have been kept on an accrual basis. You will recall my contention that despite this general rule, your case could

"I think you're done for—for wearing that long skirt."

be shown to be an exception, in that there was no definite ruling as to the taxability of your products in those years, and you did not bill any sales tax to your customers in those years.

At your request, I have examined the available sources of information on this question, and find that, in 1941, the Internal Revenue Department had ruled on precisely this question, in favor of the businessman's viewpoint, that a disputed tax liability is properly due and accruable in the year in which the dispute is settled.

This decision (I. T. 3441) (C. B. 1941-1 p 208) cites facts which are apparently exactly comparable to your situation and which may be summarized as follows:

The M. Company had not added sales tax on material installed under lump-sum contracts in the years 1935, 1936 and 1937. It considered these installations as being affixed to realty, and the sales not subject to tax because made for the improvement of real property. The tax authorities ruled otherwise, and in 1939 the company was assessed. Also, a small portion of the additional assessment covered taxes on sales of material shipped from without the state into New York City, which the company considered interstate commerce, and not subject to the tax. The tax authorities also ruled such sales taxable, and the ruling was upheld by the U. S. Supreme Court.

It is held that taxes assessed in 1939, paid out of the company's own funds which the company should have collected from its vendees in earlier years are deductible not as a tax, but as a business expense under Section 23(a) of the Internal Revenue Code.

In view of this specific favorable ruling, I have gone no further in marshalling precedents to sustain your position.

I shall be pleased to discuss this matter with you at your convenience, and help you to conclude the City case in a manner which will be squarely within the scope of the Federal Revenue Department ruling.

Very truly yours,

BB:rl
ccMMM to:
Mr. Jacques M. Levy"

For his services respondent submitted a bill for $500, describing the services as follows:

"Consultations in re deductibility in current taxable year of N. Y. City excise taxes for prior years" and "Memorandum in re above."

The charge was at the rate of about $50 an hour for his time. Respondent admitted that this work was not an isolated instance of its kind and that he often gave advice of the character which he gave to the Croft Company, without examining books or preparing tax returns. For auditing he charged $15 an hour, but for services as a tax

consultant he received as high as $50 an hour.

As the tax problem confronting the Croft Company, was a dual problem involving both a sales tax and compensating use tax, which could not be assimilated in legal treatment, there is force in petitioner's argument that respondent oversimplified the problem and inadequately covered it in his research and advice, which were confined to considering a sales tax problem. Petitioner's point is that respondent was dealing with complex questions of law, on which the numerous decisions were far from clear, and the questions were not susceptible to the cavalier answer which respondent gave. Thus, petitioner contends, respondent was entering into a field of law and fine legal distinctions far removed from the practice of accountancy. Respondent contends, on the other hand, that he was dealing with a subject which was primarily a matter of accounting, and, though touching upon the law, was within the field of accounting practice, and that the advice he gave met and correctly answered the question put to him.

We shall not dwell on the adequacy or accuracy of the advice given, or discuss the applicable law, for the decision in a case of this kind should not turn on the quality of the advice given. The decision must rest on the nature of the services rendered and on whether they were inherently legal or accounting services.

Petitioner acknowledges that tax law enters into accounting and accounting into tax law and that it is a proper function of an accountant to prepare tax returns, which work requires a knowledge and application of the law, but contends that giving advice with respect to the tax law, unconnected with work on the books or tax returns, is giving legal advice and practicing law. As much is implicit in respondent's testimony:

"Q. Answer me: did you say you knew what the legal point was involved in this question? A. I knew the point.

"Q. Did you say 'Legal' point, just then? A. I did, and I withdraw it just now.

"Q. Why? A. Because it is not a question of legal point but it is a question of applicability of the tax law as understood by accountants.

"Q. Isn't that a legal point, applicability of the tax law? A. Well, accountants have to determine questions.

"Q. You mean accountants practice law? A. No, accountants have to understand the tax law in order to be able to keep books and prepare tax returns."

Respondent then went on to say that he did no work on the books or tax return of the Croft Company.

The case is not an easy one because of the overlapping of law and accounting. An accountant must be familiar to a considerable extent with tax law and must employ his knowledge

of the law in his accounting practice. By the same token, a tax lawyer must have an understanding of accounting. It is difficult, therefore, to draw a precise line in the tax area between the field of the accountant and the field of the lawyer. Unless we are to say, however, that because common ground exists between the lawyer and accountant in the tax area no bounds may be recognized between them, some line of demarcation must be observed. We believe that the line has not been altogether obliterated, and with due regard to the latitude which should be given to the accountant, a majority of this court is quite clear in its mind that respondent's services in this matter were well into the field of the law and outside of the field of accounting. To hold otherwise would be tantamount to saying that an accountant may practice tax law.

The accountant serves in setting up or auditing books, or advising with respect to the keeping of books and records, the making of entries therein and the handling of transactions for tax purposes and the preparation of tax returns. Naturally his work and advice must take cognizance of the law and conform with the law, particularly the Tax Law. The application of legal knowledge in such work, however, is only incidental to the accounting functions. It is not expected or permitted of the accountant, despite his knowledge or use of the law, to give legal advice which is unconnected with accounting work. That is exactly what this respondent did. He was doing no accounting work for the Croft Company within the ordinary or proper conception of an accountant's work. He had nothing to do with the Croft Company's books or its tax return. He was not giving any advice as to how the books should be kept or how entries should be made or transactions or figures recorded. There was no question of the book or record handling of the facts and figures involved in the city's tax claims. The facts were all fixed, and the only question was what view the tax authorities, and ultimately the courts, would take as to the years in which the payment of the city's tax claims would be deductible for federal tax purposes. In short, legal advice was sought and given on a question of law.

That question was put to respondent not even in connection with the preparation of a tax return, but for the purpose of determining whether the city's tax claims should be compromised. What the Croft Company proposed to do in reference to the disposition of those claims depended upon the advice it got as to the law applicable to the proposed settlement, if made. The question respondent undertook to answer was in nature a question of law, as is made all the more evident when one considers the research respondent

undertook in the matter and the legal labyrinth into which any thorough research in the matter would lead.

We are told in behalf of respondent that the basis of the tax law is accounting, and that the tax subject upon which respondent gave his advice is a matter of proper accounting practice. We are also told that the administration of the tax law in the Treasury Department and other agencies of government is mainly in the hands of accountants, and that taxation is a particular specialty of accountants, in which they are more expert than lawyers.

Fortunately, the tax law conforms largely with accepted principles of accounting, as most law conforms with business customs and practices. One need only thumb through the Internal Revenue Code relating to income taxes, however, or listen to the criticism leveled at the tax laws and decisions by some writers on accountancy, to note the many respects in which tax law is at variance with usual accounting principles. And it is certainly contrary to fact to view the advice which respondent gave in this case as following accounting principles. The Croft Company kept its books on an accrual basis and, as an accounting matter, would be expected to charge the city's tax claims against the years in which they accrued. Undoubtedly that is why the company's accountant advised that the income tax deductions for those claims would have to be taken in the years in which they accrued, and could not be taken in 1943. Undoubtedly, also, that is why respondent, "as an accountant," said "No" to the question of the Croft Company's president as to whether the deduction could be taken in 1943. He undertook, nevertheless, and, in his opinion, successfully, to find a different answer in the "tax law."

An accountant may know more about the tax law than some law practitioners, just as a labor relations adviser, trust officer or customs broker may know more about the law relating to their businesses than many lawyers not specialists in the law relating to such business. A layman may know a lot of law about a particular subject, upon the knowledge of which he may rely at his own risk in his own business. He may not, however, set himself up as a public consultant on the law of his specialty. If the services of a specialist in some particular branch of the law are required, the public must still turn to the Bar, for all the reasons of public protection for which the Bench and Bar standards are maintained. The law specialist offers more and much more is required of him for admission to practice than knowledge of his specialty. He must have a grounding in the law and a legal education and training, must pass examinations in the

law and attain and maintain standards which are imposed by the Bench and Bar for the protection of the public.

The law includes many specialties, perhaps as diverse as specialties in medicine, but they are all related and integrated in the common body of the law, much the same as specialties in medicine are linked in the whole body of medicine. One might become informed, and even expert, in some narrow specialty of medicine without the general training, preparation and experience required for admission to practice medicine. Yet we know that only the generally trained doctor, grounded in medicine as a whole, has the understanding requisite to practice medicine in any of its branches, albeit the laboratories, so intimately and vitally connected with medical service, are staffed by tech-

"Mind if I take off me shirt? That light sure feels good!"

nicians who are not medical doctors.

Similarly, the law specialist should be trained and grounded in the law. A thorough knowledge and understanding of basic legal concepts, legal processes and the interrelation of the law in its parts are quite essential to the practice of law in any of its branches. Technicians are needed to serve in bureaus and agencies and in numerous nonlegal capacities, but the counselor licensed and trusted to advise the public with respect to the law must be a duly qualified and admitted lawyer. We are unable, therefore, to regard the admission of accountants, subject to certain qualifications and regulations of the Treasury Department and the Tax Court, to practice before those agencies, as an authorization to accountants to practice tax law at large or as an eradication of the distinction between the lawyer's and the accountant's function in the tax field.

It is much too narrow a view, and one revealing inadequate perception, to regard the tax law as mainly a matter of accounting. More than most specialties in the law, tax law is drawn from and involved with many branches of law. It bridges and is intimately connected, for example, with corporation law, partnership law, property law, the law of sales, trusts and frequently constitutional law. Quite obviously, one trained only in accounting, regardless of specific tax knowledge, does not have the orientation even in tax law to qualify as a tax lawyer. Equally obviously, as a matter of administration, he may not practice any phase of tax law, regardless of what might be his subjective qualifications for the particular undertaking. Inquiry cannot be made in each case as to whether the particular accountant or accountants generally are sufficiently familiar with the law on a particular tax question to be qualified to answer it. An objective line must be drawn, and the point at which it must be drawn, at very least, is where the accountant or nonlawyer undertakes to pass upon a legal question apart from the regular pursuit of his calling.

Respondent concedes that an accountant may not practice law. He is obliged, therefore, in support of his claimed freedom of action in the tax field, to resort to nomenclature which eliminates the word and concept of "law" from the tax area. The excellent brief in behalf of respondent, always employing the word "taxation" instead of "tax law," presents "taxation" as something sui generis and apart from law. The negation of taxation as law is made complete by presenting the question upon which respondent passed in this case, after studying a score or more of the hundreds of cases on the subject, as a question of "tax accounting," and, as such, a question of fact and not a question of law.

May the accountant then handle any tax problem and as a "tax consultant" entertain any tax question? Respondent appreciates his involvement, and though denying taxation as law, recognizes that frequently taxation is involved with law. Seeking to square his position with that fact and to allow for it, respondent states that not included in "income tax advice" by accountants is advice as to collateral questions of general law upon which tax liability may on occasions depend, such as domicile or the validity of a marriage, which questions may be conceded to lie within the exclusive competence of the lawyer. The concession is only a nod at reality, not a full facing of the fact. Taxation, which permeates almost every phase of modern life, is so inextricably interwoven with nearly every branch of law that one could hardly pick any tax *problem* and say this is a question of pure taxation or pure tax law wholly unconnected with other legal principles, incidents or ramifications.

This does not mean, of course, that many or most questions which may arise in preparing a tax return may not be answered by an accountant handling such work. But if the question is such a problem that an outside consultant, besides the regular accountant preparing the tax return, must be called in to do legal research of the kind which was necessary in this case, and to advise as to the none too clear, if not obscure, law, that consultant must be a lawyer.

When such problems arise, who is to say how much "general" law is involved? Essential to the solution of any problem is recognizing all the elements of the problem. It is a fair question whether respondent recognized all the elements in this case. Will anyone but the generally trained lawyer be competent to analyze difficult tax problems, which are beyond the regular accountant's ken, and be able to say what other law besides tax law is involved? And when confronted with any question of whether an accountant, acting as a tax consultant, is practicing law, are we to decide it upon the basis of determining whether any law besides tax law is involved in the matter upon which he was consulted?

Any attempt at such delineation and control would be wholly impractical. We must either admit frankly that taxation is a hybrid of law and accounting, and, as a matter of practical administration, permit accountants to practice tax law, or, also as a matter of practical administration, while allowing the accountant jurisdiction of incidental questions of law which may arise in connection with auditing books or preparing tax returns, deny him the right as a consultant to give legal advice. We are of the opinion that the latter alternative accords to the accountant all necessary and desirable latitude, and that noth-

ing less would accord to the public the protection that is necessary when it seeks legal advice.

Respondent is most persuasive when he challenges the consistency of recognizing an accountant's right to prepare income tax returns while denying him the right to give income tax advice. As respondent says, precisely the same question may at one time arise during the preparation of an income tax return and at another time serve as the subject of a request for advice by a client. The difference is that in the one case the accountant is dealing with a question of law which is only incidental to preparing a tax return, and in the other case he is addressing himself to a question of law alone.

The preparation of an income tax return is not primarily a matter of law, and generally and mainly is not a matter of law. It may usually be prepared by one having no legal knowledge, from instructions prepared for lay consumption, or by one having only incidental legal knowledge. A taxpayer should not be required, therefore, and is not required, to go to a lawyer to have a tax return prepared. It is a practical, reasonable and proper accommodation to businessmen and the accounting profession not only to permit accountants to prepare tax returns, but to permit them, despite the risks involved, to assume jurisdiction of the incidental legal questions that may arise in connection with preparing tax returns. It is quite another thing to say that, apart from preparing a tax return and from doing the accounting work in connection with the return an accountant should be permitted as an independent consultant to pass upon specific questions which are questions of law, especially when the occasion for such consultation is apt to be, as it was in this case, a particularly knotty question of law. The distinction is altogether valid and desirable. The law here, as elsewhere, is a rational and practical adjustment of conflicting interests, objectively calculated to be of the greatest public benefit.

Respondent, therefore, properly makes an appeal of public interest under the heading: "The public would be materially inconvenienced if accountants were ousted from the income tax field." His brief states that a decision adverse to respondent would prevent accountants from continuing to act as advisers in the income tax field, and would give the legal profession a monopoly in this field. The consequent inconvenience to the public is illustrated, with the observation that larger corporate taxpayers can afford to retain both lawyers and accountants on a regular basis, but that it would be unreasonable to expect the average small taxpayer to do so or to bear the expense of a lawyer's education in tax accounting and administration. The argument bears analysis.

We have heard no proposal that accountants be ousted from the income tax field. It is precisely out of consideration of the interests which respondent emphasizes that a taxpayer may, if he wishes, leave the entire preparation of the tax return to his accountant, legal incidents included, without the necessity of engaging a lawyer. It may, and probably will, remain true, as respondent quotes the American Bar Association as noting, that the bulk of income tax work is not handled by lawyers. When, however, a taxpayer is confronted with a tax question so involved and difficult that it must go beyond its regular accountant and seek outside tax law advice, the considerations of convenience and economy in favor of letting its accountant handle the matter no longer apply, and considerations of public protection require that such advice be sought from a qualified lawyer. At that point, at least, the line must be drawn. The line does not impinge upon any of the business or public interests which respondent cites, or oust the accountant from the tax field or prejudice him in any way in the pursuit of his profession, or create any monopoly in the tax field in favor of the legal profession. It allows the accountant maximum freedom of action within the field which might be called "tax accounting," and is the minimum of control necessary to give the public protection when it seeks advice as to tax law.

The order appealed from should be reversed, respondent adjudged in contempt and fined $50, and an injunction as prayed for issued.

DORE, COHN and CALLAHAN, JJ., concur; GLENNON, J., dissents and votes to affirm.

"Equity looks in all directions."

—*Murphy, J., in Comstock v. Institutional Investors,* 92 L ed Adv. Ops. 1360, at page 1375.

How True

A thrifty man went to a lawyer for advice. After the interview the man met an acquaintance and told him about it.

"But why spend money on a lawyer?" asked the other. "When you sat in his office, did you see all the law books there? Well, what he told you, you could read in those law books."

"You're right," admitted the advice-seeker, "but that lawyer—he knows what page it's on."

Edison Voice Writing.

What is the Effect of the Taft-Hartley Labor Act?

PART II

By ARTHUR L. STERN *of the New York Bar and Labor Expert for Nixon, Hargrave, Middleton and Devans, Rochester, N. Y.*

(Continued from July-August 1948 issue)

IN THE first article of this series the changes effected by the Taft-Hartley Act in representation proceedings were considered. In this article unfair labor practice sections of the Act will be discussed.

Employer Unfair Labor Practices

Under the Taft-Hartley Act employers are still forbidden to engage in substantially the same unfair labor practices that were proscribed under the Wagner Act. Briefly, these unfair labor practices are:

1. Interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

2. Dominating or interfering with the formation or administration of any labor organization.

3. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

4. Discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act.

5. Refusing to bargain collectively with the duly selected representatives of the employees in a proper bargaining unit.

Although the general nature of employer unfair labor practices is not changed by the Taft-Hartley Act, there are clarifying and modifying provisions of that Act which specify with particularity what amounts to an improper practice thereunder. These new provisions will now be discussed:

I. Union Security—Closed Shop and Union Shop

The closed shop and union shop were explicitly permitted under the Wagner Act. The Taft-Hartley Act contains an

absolute prohibition against the closed shop, and it permits the union shop or other forms of union security only under specified conditions. This it does by providing in Section 8(a)(3) that it shall be an unfair labor practice for an employer to discriminate in respect to hire or tenure of employment to encourage or discourage membership in any labor organization, except that an agreement may be made between a labor organization that is a duly selected bargaining representative and an employer requiring as a condition of employment membership in the labor organization on or after the thirtieth day following the beginning of employment or the effective date of the agreement, whichever is later, *provided that*

1. Such agreement is authorized by the employees in a "union shop" election conducted by the National Labor Relations Board (173 ALR 1414; § 17).

2. No discrimination in employment shall be justified under such an agreement for nonmembership in the labor organization (A) if membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

3. No form of union security clause whatsoever is authorized in any State or Territory in which it is prohibited by State or Territorial law.

In other words, not only is the closed shop outlawed, but the union shop is permitted subject to such stringent limitations that there is some justification for the claim that has been made that an effective union shop agreement is forbidden. Only if the employees authorize negotiation of a "union shop" agreement is it valid. Note that such authorization merely makes possible the negotiation of such an agreement and does not require the employer to accept it. And even then, discharge for nonmembership in the union is justified only if such nonmembership results from failure to tender uniform dues and initiation fees. Many problems are raised by this limitation, including problems of policy and of administration (173 ALR 1415–1417; § 21).

II. Duty to Bargain Collectively

Under both the Wagner Act and the Taft-Hartley Act the duty to bargain collectively with the duly selected representative of the employees is imposed, and it is an unfair labor practice to refuse to do so. The Taft-Hartley Act defines what is meant by bargaining collectively (173 ALR 1417; § 22). In the negotiation of a contract an employer is required

1. to meet at reasonable times.

2. to confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder.

3. to execute a written contract incorporating any agreement reached if requested by the labor organization.

But bargaining collectively does not require or compel an employer to agree to a proposal or to make a concession.

Once a collective bargaining agreement is in effect, collective bargaining includes the following requirements before such agreement may be terminated or modified:

1. Serving written notice of the proposed termination or modification at least sixty days in advance thereof.

2. Offering to meet and confer for the purpose of negotiating a new contract.

3. If no agreement is reached within thirty days after the notice is given, advising the Federal and State mediation or conciliation services that a dispute exists.

4. Continuing in effect the current contract without lockout until its expiration date or for sixty days after the notice is given, whichever is the longer period.

The obvious purpose of this amendment is to make clear what are the obligations imposed by collective bargaining. As will be hereinafter pointed out, similar obligations are imposed on the labor organization that is acting as bargaining representative.

III. Free Speech

As pointed out above, an employer may not interfere with, restrain, or coerce employees in the exercise of rights guaranteed under the Act. One of the most troublesome problems under the Wagner Act, at least from an employer's point of view, was the extent to which views, arguments and opinion might be expressed against a labor organization. The Board in numerous cases used expressions of opinion by an employer inimical to a union as a basis for a finding of unfair labor practices. The Taft-Hartley Act specifically provides that "the expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit". Freedom of speech is once more the right of employers as well as labor organizers, provided only that no threat of reprisal or force or promise of benefit is contained therein (173 ALR 1419; § 24).

IV. Responsibility for Acts of Others

Under the Wagner Act an "employer" included "any person acting in the interest of an employer", and the Board held an employer responsible for antiunion campaigns conducted by a Chamber of Commerce, a citizens' committee, a labor relations service company, etc. The Taft-Hartley Act changes this—an "employer" is defined as including any person acting as an agent of an employer, directly or indirectly. In substance this means that employers are responsible for what others say and do when it is within the actual or apparent scope of their authority. Under this rule employers would be responsible for the acts of supervisory personnel, unless notice actually is given that they have no authority to act or speak for management, but actual agency would have to be shown before an employer could be held responsible for the acts of outsiders (173 ALR 1420–1421; § 25).

A further limitation is placed upon an employer's liability by excluding from the definition of "employee" (in respect to whom unfair practices may be committed) independent contractors. There are other specific limitations in particular cases by excluding from coverage of the Act persons employed in agriculture, domestic service, persons subject to the Railway Labor Act, etc. (173 ALR 1421–1422; § 25).

Union Unfair Labor Practices

Under the Wagner Act no unfair labor practices by a union were recognized. The Taft-Hartley Act proscribes certain practices as unfair when committed by unions, thus making unions equally responsible with employers for interfering with the rights of individual employees and imposing upon unions obligations commensurate with those imposed upon employers. These union unfair labor practices are:

V. Restraint or Coercion by Unions

Just as employers are forbidden to restrain or coerce employees in the exercise of their rights to bargain collectively and to select representatives of their own choosing, or to refrain from such activities, so too are unions. This prohibition would prevent "goon squads", threats of violence or reprisal for failure to join a union, mass picketing, intimidation, etc. It is extremely doubtful if false electioneering statements, misrepresentation, or defamatory remarks are also forbidden (173 ALR 1423; § 27).

VI. Discrimination against Employees

Employers are forbidden to discriminate against employees for membership or nonmembership in a union, except under the limited "union shop" agreement sanctioned by the Act. Here,

unions are placed under a similar prohibition and may not cause or attempt to cause an employer to discriminate against any employee except for failure to pay uniform dues and initiation fees under a proper union shop agreement. Under this section it would seem that unions as well as employers may be held responsible for back pay to employees discriminated against by an employer as a result of a union's improper acts (173 ALR 1424; § 28).

VII. Refusal to Bargain

The employer is required to bargain collectively with the duly selected labor organization that represents his employees. Here that duly selected labor organization is proscribed from refusing to bargain collectively with the employer. The same obligations to "bargain collectively" that are imposed upon an employer are imposed upon a union, both in respect to negotiation of a new contract and termination or modification of an existing one, including a provision that no strike shall be called by a union during the limited period following notice of termination or modification of an existing agreement.

VIII. Strikes or Concerted Activity for Certain Purposes

Unions are forbidden to engage in strikes or other concerted activities to accomplish certain results which were found by Congress to be detrimental to the public interest (173 ALR 1425–1426; § 30). Peaceful settlement under procedures established in the Act are possible in each instance, and accordingly, strikes or other concerted activities are forbidden where the purpose thereof is

1. To establish a secondary boycott.

2. To force another employer to recognize an uncertified union.

3. To force any employer to recognize a union when another union is the certified bargaining agent.

4. To determine a jurisdictional dispute.

Specifically excluded from the prohibition is refusal to cross a picket line before the establishment of *another* employer, if the picket line is established as the result of approval or ratification of the duly selected and proper bargaining representative of the employees of such other employer.

IX. Excessive Initiation Fees

Where, and only where, the limited "union shop" permitted by the Act is in effect, it is an unfair labor practice for the union to require of employees the payment of initiation fees which the Board finds excessive or discriminatory under the circumstances. What initiation fees are reasonable and what are excessive will depend, among other

things, on the size of the labor organization, the wage rates of its members, the benefits it confers and the stability of membership and of employment in the trades and industries in which the members work (173 ALR 1426; § 31).

X. Featherbedding

It is an unfair labor practice for a union to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value in the nature of an exaction for services which are not performed or not to be performed. This provision of the Taft-Hartley Act carries into the labor law prohibitions of practices which have been made subject to criminal penalties under the Lea Act. What is obviously intended here is to proscribe practices bordering on extortion, such as paying "stand-by" employees, and no prohibition against such practices as paid rest periods, call in pay, etc. is included (173 ALR 1426–1427; § 32).

. . . .

These, in substance, are the unfair labor practices as established for employers and unions in the Taft-Hartley Act. Perhaps there is reason for justifiable criticism of some of the restrictive provisions applicable to "union shop" agreements (ALR reference). And perhaps too there is need for clarification of certain of the provisions, particularly those applicable to union unfair labor practices. But with the primary objectives of these sections of the Act—to define more clearly what is and what is not an unfair practice and to make unions equally responsible with employers for acts detrimental to the best interests of employees and of the public generally—there can be no quarrel. If given an opportunity to work by both labor leaders and industry heads, these sections of the Act, with minor modifications, should accomplish the desired result of furthering better labor relations without improperly restricting unions in the exercise of their justifiable prerogatives.

(*Continued in November-December 1948 Case and Comment*)

Coerced Confessions

"Coerced confessions are outlawed by the due process clause regardless of the truth or falsity of their content. It is just as uncivilized to brutalize an accused person into telling the truth as it is to force him to fabricate a confession."

—*Murphy, J., in Taylor v. Alabama,* 92 L ed Adv. Ops. 1394, at page 1407

Among the New Decisions

Alteration of Instruments — *changing branch of bank on which drawn.* Justice Desmond of the New York Court of Appeals in Re Goebel, 295 NY 73, 174 ALR 296, 65 NE2d 174, prepared the opinion holding that a check drawn on the branch of a bank in which the drawer had made a deposit which through the bank's error was credited to an account in another branch, is not materially altered, so as to invalidate it, by the act of the person presenting it for certification at the branch on which it was drawn in substituting, at the suggestion of the bank's officers, the name of the branch in which the deposit had been credited.

See the annotation in 174 ALR 299 discussing the question "Alteration in check or other instrument of name of branch of bank as material."

Appeal — *defendant's right to reversal on inadequacy of verdict.* The Georgia Supreme Court in Johns v. League, Duvall & Powell, — Ga —, 174 ALR 757, 45 SE2d 211, opinion by Justice Bell, held that the fact that a verdict in favor of a broker in his action for commissions on a sale of real estate, under an express contract for a liquidated amount, is for a less amount than that to which the plaintiff was entitled if entitled to recover at all, does not entitle the defendant to a reversal on the ground that the verdict was contrary to the court's charge to the jury that it would be a 5 per cent commission if the plaintiff was entitled to recovery and that if the jury found that the plaintiff had made out his case then the verdict would be for the plaintiff in such amount as the jury believed he was entitled to from the evidence.

The annotation in 174 ALR 765 discusses "Inadequacy of verdict as ground of complaint by party against whom it is rendered."

Bailment — *effect of delivery to third person.* The Ohio Court

of Appeals in Aetna Casualty & Surety Co. v. Higbee Co., 80 Ohio App 437, 174 ALR 1429, 76 NE2d 404, opinion by Justice Skeel, held that a fur dealer in a suit against it for the conversion of a fur coat delivered to it for storage with directions to have it repaired and cleaned, which was stolen from a cleaner to whom the defendant, without the owner's consent, delivered the coat to be cleaned, is entitled to introduce evidence to establish a custom in the community for retail fur dealers and fur departments of department stores to send out to others the work of cleaning fur articles, and to show that such custom was well known to people of the community so that when a customer contracts with a retail fur dealer for the repair and cleaning of a fur garment he impliedly consents to this means of accomplishing the work contracted to be done.

This question is discussed in the annotation in 174 ALR 1436 under the title "Delivery of bailed property by bailee to third

"Well, we didn't really expect to inherit anything, anyway, and I can always send back the things I bought."

person for accomplishment of bailment purpose, as a conversion."

Cemeteries — *restrictions on embellishment of lot.* The Maryland Court of Appeals in Abell v. Green Mount Cemetery, — Md —, 174 ALR 971, 56 A2d 24, opinion by Chief Justice Marbury, held that a restriction imposed in a certificate of ownership of a cemetery lot that all enclosures, monuments, or other structures upon the lot shall be of a design approved by the officers of the cemetery corporation is not too vague and indefinite to be enforceable.

The annotation in 174 ALR 977, discusses "Validity and construction of conditions in title to burial lot or regulations by cemetery company as regards monuments, vaults, and the like."

Community Property — *constitutionality of law relating to.* The holding of the Pennsylvania Supreme Court, opinion by Justice Horace Stern, in Willcox v. Penn Mutual Life Insurance Co., 357 Pa 581, 174 ALR 220, 55 A2d 521, is to the effect that the failure of a community property law conferring power of disposition of community property on the husband (or the wife, as the case may be) to define or limit the extent of that power, or to furnish any indication of a standard or guide for the court to follow in adjudicating problems arising from asserted rights of gift or other disposition of community property, constitutes such vagueness as to be fatal to the validity of the act.

The annotation in 174 ALR 235 discusses "Validity of community property legislation."

Constitutional Law — *delegation of authority.* A nice constitutional question is discussed in State ex rel. Keefe v. Schmiege, 251 Wis 79, 174 ALR 1338, 28 NW2d 345, opinion by Justice Fairchild. It is there held that a statute delegating to counties the power to create a crime is void as an attempt to confer sovereignty upon the counties, the sovereign alone having the power to create a crime.

The annotation in 174 ALR 1343 discusses the question "Delegating authority to county or municipal corporation to make violation of ordinance crime or to provide criminal punishment."

Constitutional Law — *par check law.* The Nebraska Supreme Court in Placek v. Edstrom, 148 Neb 79, 174 ALR 856, 26 NW2d 489, opinion by Justice Chappell, held that a statute requiring banks to clear at par checks drawn on deposit accounts does not relate to or affect the contract of a bank with its depositors and therefore does not unconstitutionally impair the obligation of existing contracts; nor can it be said to unconstitutionally impair the obligation of any contracts between the

drawee bank and the forwarding bank, since a statute cannot impair obligations of contracts made subsequently to its effective date.

The annotation in 174 ALR 869 discusses "Constitutionality, construction, and application of statutes requiring clearance of checks at par."

Contracts — *cancelation of transfer which is ineffective for purpose made.* The Michigan Court in Stone v. Stone, 319 Mich 194, 174 ALR 1349, 29 NW2d 271, opinion by Justice Dethmers, held that parents who have gratuitously transferred to their infant children interests in a family partnership upon being advised by competent tax consultants that by so doing Federal income taxes could be minimized by filing separate returns may, where separate returns have been held not permissible, have the transfer set aside as having been made under a mistake of law as to their own antecedent and existing legal rights.

The subject of the annotation in 174 ALR 1352 is "Judicial avoidance of gift or other transfer of property motivated by unsuccessful purpose of escaping or reducing tax."

Contributory Negligence — *of children.* In Verni v. Johnson, 295 NY 436, 174 ALR 1078, 68 NE2d 431, opinion by Justice Desmond, it was held that a child of the age of three years and two months is conclusively presumed to be incapable of contributory negligence.

Supplementing an earlier annotation in ALR the later decisions treating contributory negligence of children are discussed in 174 ALR 1080.

Criminal Law — *false pretense with worthless check.* An interesting question of criminal law was decided in Whatley v. State, 249 Ala 355, 174 ALR 169, 31 So2d 664, opinion by Justice Brown. It was there held that the payee of a check given as down payment on a contract for the construction of a house, which the payee orally agreed not to cash until the drawer was satisfied that a stipulated amount of work had been done toward the building of the house, is not guilty of obtaining money on false pretenses by reason of having on the same day cashed the check by presenting it to a bank in due course, duly indorsed, without any representations to the bank officer who cashed the check, although the drawer stopped payment at the bank on which the check was drawn, resulting in the nonpayment of the check.

The annotation in 174 ALR 173, which supplements an earlier annotation in ALR, discusses the question "False pretenses or confidence game through means of worthless check or draft."

Declaratory Judgment — *interest in statute or ordinance.* The Minnesota Supreme Court in

State Ex Rel. Smith v. Haveland, 223 Minn 89, 174 ALR 544, 25 NW2d 474, opinion by Justice Matson, held that a litigant who questions the constitutionality of a statute, whether by suit for a declaratory judgment or otherwise, must, in order to invoke the jurisdiction of the court, be able to show that the statute is, or is about to be, applied to his disadvantage, and not merely that he suffers in some indefinite way in common with people generally.

The question "Interest necessary to maintenance of declaratory determination of validity of statute or ordinance" is discussed in 174 ALR 549.

Easement — *underground tile line.* In McKeon v. Brammer, — Iowa —, 174 ALR 1229, 29 NW2d 518, opinion by Mulroney, J., it was held that an existing prescriptive easement in underground tile lines for the purpose of draining the dominant land across the servient land, which by its nature is not visible or apparent, is not extinguished or terminated by a sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice, and the purchaser takes subject to the easement.

The title to the annotation in 174 ALR 1241 is "Extinguishment of easement by implication or prescription, by sale of servient estate to purchaser without notice."

Electricity — *injury to trespasser.* An interesting question of negligence law was decided in Edgarton v. H. P. Welch Co., — Mass —, 174 ALR 462, 74 NE2d 674, opinion by Justice Spalding. It was there held that recovery against an electric power company for the death of a passenger in a truck who was electrocuted when the truck, which had run off the highway onto adjoining land over which the power company had a right of way for its power lines and broken off a power line pole, became charged with electricity from a broken power line that was re-energized by the alleged negligence of the substation operator, is not barred upon the ground that the decedent was a mere trespasser or licensee who could recover only on the ground of wanton or reckless conduct on the part of the power company, there being no voluntary act on the decedent's part which brought either him or the truck in which he was riding in contact with any property of the power company.

The question "Unintentional intrusion on land of another as affecting right of recovery for injuries" is discussed in the annotation in 174 ALR 471.

Evidence — *res ipsa loquitur from injury occurring from coalhole.* The Minnesota Court in Fandel v. St. John The Evangelist, — Minn —, 174 ALR 600, 29 NW2d 817, opinion by Justice Gallagher, held that no inference

of negligence on the part of an abutting owner can be inferred from the fact that a pedestrian stepped, after dark, into a coalhole in the sidewalk from which the cover had been removed, where the cover was of such weight as not to be readily removable and, being in the street, was not under the exclusive control of the abutting owner, who had not made use of the coalhole for some months previously.

The annotation 174 ALR 607 discusses "Res ipsa loquitur as applicable to injury due to coalhole or other opening in street or sidewalk."

Federal Rent Control — *nuisance under.* The Mississippi Supreme Court in Young v. Weaver, — Miss —, 174 ALR 983, 32 So2d 202, opinion by Roberds, J., held that the fact that tenants refused to admit to their apartment early in the morning a carpenter sent by the landlord, but later in the day admitted him, and that some unfriendly relations developed between the family of the landlord and that of the tenant, do not constitute a nuisance as a ground for eviction of the tenant under the Federal Rent Control Act.

The legal situations under which a tenant may be removed under the nuisance provision of the Federal Rent Control Act are discussed in the annotation in 174 ALR 989.

Forgery — *of void instrument.* The Alabama Court in Gooch v. State, 249 Ala 477, 174 ALR 1297, 31 So2d 776, opinion by Justice Simpson, held that a check given on Sunday, unless for one of the purposes permitted by the law as set forth in the Sunday statute, is void and is not the subject of forgery.

The annotation in 174 ALR 1300 treats the subject "Invalid instrument as subject of forgery."

Fraud — *representation as to condition of property.* Justice Vallee of the California District Courts of Appeal, Second District, wrote an opinion in Blackman v. Howes, 82 Cal App2d (Adv 295), 174 ALR 1004, 185 P2d 1019, holding that a statement made by the vendor's broker, in response to inquiry made by the buyer's representative, that the lot which the buyer was negotiating to purchase was not a filled lot is a representation of fact which if false will constitute the basis of an action of fraud against the vendor.

The annotation in 174 ALR 1010 discusses "Fraud predicated upon vendor's misrepresentation of physical condition of real property."

Gift Taxes — *when transfer subject to.* What is a gift for tax purposes? Some perplexing problems arise. For example, in Commissioner v. Converse, 163 F2d 131, 174 ALR 199, opinion by Circuit Judge Chase of the

Second Circuit, it was held that a payment made by a divorced husband to his former wife to satisfy a provision of the judgment of divorce for the payment of a sum of money in satisfaction of the obligations of a separation agreement whereby the wife released her marital rights is, in view of the facts that the estate and gift tax statutes are in pari materia and that the judgment if unpaid in the husband's lifetime would have been collectible out of his estate and deductible for estate tax purposes, not subject to gift tax, being upon an adequate consideration in money's worth.

An extensive annotation in 174 ALR 203 discusses "Consideration as affecting liability for gift tax."

Income Taxes — *interest before assignment.* In Austin v. Commissioner, 161 F2d 666, 174 ALR 615, opinion by Circuit Judge Martin of the United States Circuit Court of Appeals, Sixth Circuit, it was held that interest accrued on a secured note given by a husband to his wife, of which at the time she

"Funny how my biggest case had to come right smack on our anniversary."

Electronic Memory

augments your legal staff... without adding a salary!

The Webster-Chicago *Electronic Memory* Never Forgets!

There is no danger of misunderstanding important testimony, client interviews, conferences and research data which form the basis of your briefs, depositions, abstracts and courtroom performances. Hundreds of details must be gathered, formulated, edited and rehearsed accurately. The *Electronic Memory* can simplify this laborious detail. It is extremely flexible... retains every sound wire-recorded upon it... may be played back as many times as desired for close scrutiny and study of obscure facts. Or the wire may be erased by simply recording over the same wire. Here is an assistant you can depend upon ..always with you, always accurate because it repeats exactly what was said... *how* it was said.

Webster-Chicago *Electronic Memory* comes complete with microphone and 3 spools of wire, ready to plug into an AC outlet for recording or listening. The stainless steel recording wire may be erased and reused thousands of times or kept indefinitely without loss of fidelity.

Shorten unprofitable research time with the *Electronic Memory*

Eliminate scribbled notes and laborious writing. Simplify the handling of volumes of reference material by using the *Electronic Memory* at your elbow. It remembers every detail When your facts are wire-recorded the final assembly is quick and accurate. See your nearest dealer or write for free booklet.

WEBSTER-CHICAGO

Electronic Memory

by the makers of famous Webster-Chicago Record Changers and Magic Nylon Phonograph Needles

5610 W. Bloomingdale Ave., Chicago 39, Ill.

Webster-Chicago, Dept. L-2
5610 West Bloomingdale Avenue
Chicago 39, Illinois

Please send me a copy of "The *Electronic Memory* for Commercial and Professional Use."

Name_____

Address_____

City_____ Zone____ State_____

made a gift of the note to her children she had no expectation of payment at any foreseeable time in the future by reason of the husband's shortage of ready money, but which the husband had sufficient assets to pay, is taxable to the wife, reporting income on a cash basis, as income of the year in which it was subsequently paid to the donees.

The annotation in 174 ALR 619 discusses "Interest paid to assignee or donee of obligation, for period antedating assignment or transfer, as taxable income of assignor or donor."

Injunctions—*against peaceful picketing.* In Fred Wolferman v. Root, — Mo —, 174 ALR 585, 204 SW2d 733, opinion by Presiding Justice Douglas, it was held that picketing by a labor organization may be enjoined where the purpose of the concerted action is unlawful.

A comment note "Lawful or proper labor purpose as condition of right of peaceful picketing" appears in 174 ALR 593.

Joint Tort-feasors — *separate trials for.* The Iowa Supreme Court in Way v. Waterloo, C. F. & N. R. Co. — Iowa —, 174 ALR 723, 29 NW2d 867, opinion by Mulroney, J., held that in an action against a truck driver and a railroad company as joint tort-feasors for wrongful death resulting from the concurrent negligence of the two defendants, the fact that recovery is sought against the truck driver under the common or statutory law of the state and against the railroad company under the Federal Employers' Liability Act does not give the latter a right of severance.

The annotation in 174 ALR 734 discusses "Right of defendant sued jointly with another or others in action for personal injury or death to separate trial."

Judgment — *reopening for partial defense.* In State Ex Rel. Land Office Comrs. v. Jones, 198 Okla 187, 174 ALR 1, 176 P2d 992, opinion by Justice Gibson, it was held that the term "valid defense" as used in a statute making the existence of a valid defense a condition of the right to have a judgment vacated, has reference to a defense which has such merit that the law will recognize it and give effect thereto. It is not necessary that there be a valid defense to the whole cause of action.

An extensive annotation on the question "Scope and character of meritorious defense as condition of relief from judgment" appears in 174 ALR 10.

Labor — *collective bargaining units.* It was held in Re International Asso. of Machinists, 249 Wis 112, 174 ALR 1267, 23 NW2d 489, opinion by Justice Fritz, that as used in a statute defining the term "collective bargaining unit" as meaning all of the employees of one employer except where a majority of such employees engaged in a

single craft, division, department, or plant shall have voted to constitute such group a separate bargaining unit, the term "craft" was intended to comprehend any group of skilled workers whose functions have common characteristics distinguishing them sufficiently from others to give such group separate problems as to working conditions for which they might desire a separate bargaining agent.

The title of the annotation in 174 ALR 1275 is "Units for collective bargaining."

Limitation of Actions — *in wrongful death cases.* The Florida Supreme Court in St. Francis Hospital v. Thompson, — Fla —, 174 ALR 810, 31 So2d 710, opinion by Justice Barns, held that the statute of limitations requiring an action upon account of an act causing wrongful death to be commenced within two years begins to run from the time of death, the date of the accrual of the cause of action, and not from the time of the commission of the wrongful act from which death resulted.

The annotation in 174 ALR 815 discusses "Time from which statute of limitations begins to run against action for wrongful death."

Limitation of Actions — *wrongs of corporate officers.* The Delaware Supreme Court in Bovay v. H. M. Byllesby & Co., — Del —, 174 ALR 1201, 38 A2d 808, opinion by Chief Justice Layton, held that where corporate officers and directors are required to answer for wrongful acts of commission by which they have enriched themselves to the injury of the corporation, a court of conscience will not regard such acts as mere torts as to which they are entitled to the benefit of the statute of limitations, but as serious breaches of trust, and, while they are not in strictness trustees, they will be treated as though they were in fact trustees of an express and subsisting trust, without the protection of the statute of limitations, especially where insolvency of the corporation is the result of their wrongdoing.

The subject of the annotation in 174 ALR 1217 is "Application of limitation statutes to nonderivative suits based upon wrongs of corporate officers or directors."

Mortgages — *restrictions on bondholders' suits.* In Miller v. Corvallis General Hospital Asso., — Or —, 174 ALR 424, 185 P2d 549, opinion by Justice Bailey, it was held that an action by the holder thereof to recover on a matured, interest-bearing bond, consisting of one of a series of an issue of corporate bonds secured by a mortgage and deed of trust, does not affect, disturb, or prejudice the lien of the trust agreement within the meaning of a stipulation in that agreement that no one of the bondholders shall have any right in

any manner whatever by his action, to affect, disturb, or prejudice the lien of the indenture.

A supplemental annotation on the question "Validity, construction, and application of express restrictions on right of action by individual holder of one or more of a series of corporate bonds or other obligations" appears in 174 ALR 435.

Municipal Corporations — *liability for negligence to children.*—The Pennsylvania Supreme Court in D'Ambrosio v. Philadelphia, 354 Pa 403, 174 ALR 1166, 47 A2d 256, opinion by Justice Linn, held that the act of a plaintiff twelve years and eight months of age in riding on the tail gate of a truck, in violation of a statute providing that no person shall hang onto or ride on the outside or rear end of any vehicle, and prescribing a fine and imprisonment for violation thereof, constitutes negligence per se, so as to bar his recovery against a city for injuries received in being thrown from the truck when it passed over a hole in a city street, and it is error for the trial court to submit to the jury the question of such

"But what will our wives say if we don't find her guilty?"

plaintiff's contributory negligence.

The annotation in 174 ALR 1170 discusses the question of "Child's violation of statute or ordinance as affecting question of his negligence or contributory negligence."

National Labor Relations Act — *jurisdiction of state board.* The Pennsylvania Supreme Court in Pittsburgh Railways Co. Substation Operators and Maintenance Employees' Case, 357 Pa 379, 174 ALR 1045, 54 A2d 891, opinion by Justice Patterson, held that the determination of the collective bargaining unit and the collective bargaining agent for employees involved in a labor dispute with their employer is a matter exclusively within the jurisdiction of the National Labor Relations Board where interstate and foreign commerce would be directly or substantially affected by the disruption or cessation of the employer's operations, and state power cannot be constitutionally exercised.

The cases are in conflict on this question. The annotation in 174 ALR 1051 discusses the various holdings.

Nuisances — *riding academy as.* The Minnesota Supreme Court in Robinson v. Westman, 224 Minn 105, 174 ALR 746, 29 NW2d 1, opinion by Justice Thomas Gallagher, held that a riding academy in a residential neighborhood is a nuisance where the incidental noise, odors, insects, and vermin cause material discomfort to the residents, and the riders in their use of the streets endanger the safety and restrict the activities of children living in the district and trample the lawns and gardens.

See on this point the annotation in 174 ALR 755.

Specific Performance — *return of vendor's improvements.* In Fontaine v. Brown County Motors Co., 251 Wis 433, 174 ALR 694, 29 NW2d 744, opinion by Rector, J., the Supreme Court of Wisconsin, held that where the owner of land, forgetting that another has an option to purchase it at a stated price, constructs a valuable improvement thereon and the holder of the option elects to exercise it, specific performance will be decreed only upon condition that the optionee pay, in addition to the price fixed by the option, such appreciation in value, not exceeding the cost of the improvement, as resulted therefrom, but reserving to the vendor the option of removing the improvement within a specified time.

Cases from all jurisdictions discussing the effect of improvements made after execution of a contract to convey are discussed in the annotation in 174 ALR 699.

Spendthrift Trusts — *estate tax on.* The Maryland Court of Appeals in Fetting v. Flanigan,

185 Md 499, 174 ALR 301, 45 A2d 355, opinion by Justice Henderson, held that sums due the estate of a deceased beneficiary of a spendthrift trust from the trust estate may be reached by the executor of the trust estate through execution by equitable procedure to subject such sums to the beneficiary's pro rata share of a Federal estate tax upon the trust estate which the executor has paid, the claim of the executor being in the nature of reimbursement or exoneration.

The subject of the annotation in 174 ALR 310 is "Claims enforceable against spendthrift trust other than those created by voluntary act of beneficiary."

Spendthrift Trusts — *power to terminate.* The Florida Court in Waterbury v. Munn, — Fla —, 174 ALR 620, 32 So2d 603, opinion by Justice Sebring, held that the spendthrift character of the trust created by a will to pay income to testator's children or their descendants for life, with remainder upon the death of the last surviving child to the descendants of children per stirpes, is not destroyed by a codicil empowering the trustees, who were three of the five beneficiaries, to dispose of the trust property at any time at their discretion and to distribute the proceeds among the children, with the proviso that until the trust property is sold the trustees shall have and enjoy the same rights, privileges, and powers in respect of the property as were given them by the will and shall make distribution of the net income derived therefrom as by the will directed.

See annotation in 174 ALR 624 on "Spendthrift trust as affected by provision empowering trustee or beneficiary to terminate trust and distribute property to beneficiaries."

Succession Taxes — *tax on subject of power of appointment.* The New York Court of Appeals in a per curiam opinion in Re Rogers, 296 NY 676, 772, 174 ALR 625, 70 NE2d 170, 748, held that the fact that part of the property subject to a testamentary general power of appointment was appointed to persons who were to take greater interests in default of appointment does not diminish, to the extent of the value of the property so appointed, the amount to be included for New York estate tax purposes in the estate of the donee of the power under the provisions of the taxing act that the gross estate of a decedent for the purpose of such tax shall include any property passing under a general power of appointment exercised by the decedent by will.

A supplemental annotation on "Inheritance, succession, or estate tax on property covered by power of appointment" appears in 170 ALR 635.

Trademarks — *geographical name.* Circuit Judge Clark of the United States Circuit Court of Appeals, Second Circuit, wrote the opinion in California Apparel Creators v. Wieder of California, 162 F2d 893, 174 ALR 481, holding that in order to be entitled to damages or injunctive relief, on the ground of unfair competition, against New York corporations on account of their use of the name "California" in their tradenames, California manufacturers and dealers must show not only a representation by the defendants which is false and deceitful in the sense of luring customers to their doors wrongfully, but also that the plaintiffs have lost their own rightful custom thereby.

The general question of "Unfair competition in use of geographical tradename by persons carrying on business elsewhere" is treated in the annotation in 174 ALR 496.

Wills — *interest created in bequest of income.* The Pennsylvania Court, opinion by Justice Patterson, held in Re Carmany, 357 Pa 296, 174 ALR 311, 53 A2d 731, that intent of a testator to give his daughter an estate of inheritance and not to die intestate is manifested by the residuary provisions of his will directing his executors to hold the residuary estate in trust, to pay taxes and all other expenses of administration, a stipulated semiannual sum to his wife for her life or during widowhood from the income, and the balance of the income to the testator's daughter, "her heirs and assigns."

The annotation in 174 ALR 319 discusses "Grant or gift of income as carrying an absolute interest in the property."

Loudspeakers

"Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning? Must he prove to the satisfaction of that official that his noise will not be annoying to people?"

—*Douglas, J., in Saia v. New York,* 92 L ed Adv. Ops. 1087, at page 1090.

The Law Still Ticks—A Satire on Interstate Commerce

By PAUL FREEMAN of the Philadelphia Bar

TICK-TOCK left Come Along and Creeper's law office in disgust. He had had only a few minutes to spare and had stopped to ask Creeper a very simple question about a new tax. He knew the answer already—he was quite sure of that—but he wished it confirmed. He was certain that any really good lawyer could have answered his question as he wished it answered—and done it in a very few moments. Instead, Creeper had taken an hour and a half to explain to him just why he feared that Tick-Tock would have to pay the tax—though at that he was still a bit vague about it.

Tick-Tock crawled into his car and told his chauffeur to drive home carefully and not to get involved in any dog-fights on the way. He must think things over carefully before leaving Come Along and Creeper. They were good lawyers and had represented his father before him. It would be a mistake to be too hasty and he hesitated to make a change.

He let himself into his front door, put on seven of his eight slippers—the eighth had been lost for a long time now—put his feet on a footstool and decided to review all his family's many matters which Come Along and Creeper had cared for. He lit his pipe because certainly its contentment would prevent prejudice and induce the necessary judicial attitude needed for the question involved.

He recollected his father's first meeting with Come Along. All his life, his father had been a traveler—and particularly fond of interstate trips. Indeed that had been his primary purpose in building his home in Crawltown just where he had it built. For part of that village was in the state of Arivada and part in North Caralota and his father had had the house built so that one part of it was in one state and the other in the other state. The truth was that the line ran right through the dining room. He could not forget that Come Along had told him this was a mistake. His father had been divorced just before he had moved to Crawltown and had come there after he had remarried.

Come Along had insisted that the Master Bedroom should be in Arivada because he said North Caralota had a different

moral tone. He had been so insistent on that point that his father had yielded—despite the bitter protest of the architect who complained that this disarranged everything. However, his father would yield no further, so the house was built squarely over the line between the States.

No, he must give Come Along credit for that bit of advice and it would have been better had his father followed it implicitly—for then at least the present tax matter would not have plagued him.

He remembered too with a feeling of hot resentment how his father had been arrested on a statutory charge by the North Caralota authorities — though thousands of others had done precisely the same thing and had not been molested.

Then there was the trial. It was seared on his brain as though it had happened but yesterday. He remembered the six tickstaves who never had anything to do but run errands for the judge, and who, taking their cue from him, were rude to every one but the newspaper reporters. The judge had been late in arriving, but the trial was delayed even after he had crawled into his chair until all the newspaper men were comfortably seated and had properly adjusted their cameras and flashlights.

Then he had looked at the jury panel and had been astonished to see that not a man was on it, and that every member of it was a blond. Of course, the spectators and the reporters had noticed it too and while the judge severely rebuked the spectators for laughing loudly about it, he permitted the newspaper men to take flashlights of the whole panel arranged with their skirts at the proper height.

But eventually Creeper, who did all the trial work for the firm, had won the case on that very fact, for he discovered that the newly elected Sheriff was color blind and had put into the wheel only blonds. After the disgrace of the conviction Creeper had argued—and finally the judge had agreed with him—that the complete elimination of brunettes deprived his father of his right to a trial by his peers, and so a new trial had been granted. The Sheriff was very bitter indeed about the whole matter and had engaged a very learned lawyer, A. Mixus Curious by name, who had argued that it was contemptible to take advantage of the Sheriff's physical infirmity since certainly he could not help having been born color blind. Curious also belaboured the point that, and it was so well known the judge admitted it at once, brunettes were always more busy with their housework than blonds and when their names had been drawn they were always excused, so that it amounted to precisely the same thing in the end.

After the new trial had been granted, the Sheriff took sweet revenge on Creeper by neiing every writ with the firm's name on it which the Clerk sent up for service.

Then Tick-Tock's mind reverted to the talk he had just had with Creeper. The kitchen of his home was in Arivada and he had become accustomed to the sales tax which that state had imposed. He kept every bit of the food he bought in Arivada in its original package—and some little inconvenience it was too. He had had to dismiss one (very good) cook who insisted on breaking the original packages as soon as they came, and told him to his face that she did not propose to follow any lawyer's recipes in her kitchen—it would poison any dish to cook it according to law.

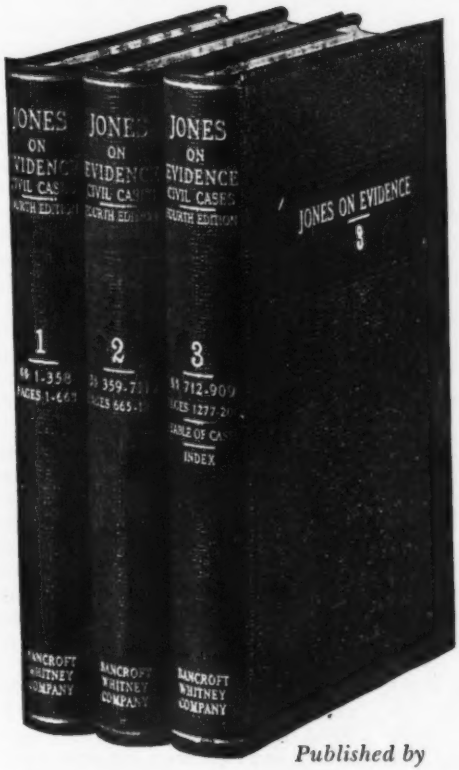
Now North Caralota had imposed a new use tax and Come Along had told him he would have to pay it, unless he moved the dining room table into the Arivada part of the dining room which could not be done because it would not fit.

He realized that Come Along

"I repeat, 'You're a big stinker'—go ahead, put us in jail for the night!"

Jones on Evidence

THE LAW OF EVIDENCE IN CIVIL CASES
A GREAT WORK ON A GREAT SUBJECT



The RED BOOK OF EVIDENCE

•

Your vade mecum
for
OFFICE USE
DESK BOOK
COURT ROOM
HOME OR
TRAVELING

•

3 Volumes, box-grained, red fabrikoid binding, $25.00 delivered. Terms if desired, $5.00 cash and $5.00 monthly.

•

Published by

BANCROFT-WHITNEY COMPANY

200 McALLISTER STREET • SAN FRANCISCO

had been most patient in explaining the point to him. Come Along had said that the law was really a matter of drawing lines and to prove it had shown him his book which had nothing but lines in it. Though not a lawyer, Tick-Tock was intelligent and had had a complete college education so that he could see that some of the lines were straight, others were bent, many were crooked and not a few went round in circles, while others crossed themselves. He noticed that some of the lines in the first part of the book had been erased lately with such eager carelessness that the pages had been torn. Then too he saw that earlier in the book the lines had been white but toward the back they had become blacker and blacker which made them the more difficult to see in the twilight especially as they were becoming finer and finer. Indeed he failed to understand how Come Along could make anything out of it all.

Come Along had explained that sometimes the lines were marked by stones and then again by reeds but often children playfully moved the stones and sometimes even took them into their homes, so that it was with difficulty that one could tell where they had been. Come Along had called his attention to two roadside advertising signs one of which told of a tasty new sausage, not too well done, and the other of a kind of ale, which (the sign said) had very little head to it.

He had argued with Come Along that a use tax certainly could not be due until the article was really used and that, as to food, that could not occur till digestion set in. He told Come Along that he could hurry through his meal and get back to his living room before his meal had begun to be digested and that as it was in the Arivada part of the house he should not have to pay the use tax. But Come Along had said that the lines in his book were very practical on tax matters and he doubted that the judge would listen to this argument for the tax had been levied for the eminently proper purpose of increasing the judge's stipend and so the object of it was very practical indeed.

Tick-Tock had reminded Come Along of his advice on a former occasion which had been that he did not need to cross the line in the dining room to take an interstate trip and that all he needed to do was to put in an elevator and ride up and down in it, since now state lines were drawn perpendicularly as well as horizontally. He asked Come Along to explain how that squared with what he had just told him. Come Along had become a bit provoked and had said rather crossly that interstate travel was one thing on week days, and quite a different thing on Sundays when the roads were crowded.

Tick-Tock had not had money enough to install the elevator, but he was certain he had accomplished his purpose by putting up a stick in his den and crawling up and down it when he felt the urge for an interstate trip and wished to take a different one from crawling over the line in his dining room. He had taken great care never to tell Come Along about his "elevator", for he was certain something would be said that would spoil his pleasure in being able to take two different interstate trips without leaving his own house.

Susceptibility

In view of the fact that Longview and Gregg County have experienced quite an oil boom in recent years, we have had our share of criminals which usually go with an oil boom, and as a result have had several robberies in this community. Some of our citizens who served as jurors have become so prejudiced against this form of crime that the mere fact that a person is charged with robbery would prevent them from being an impartial juror.

Not long ago I was defending a man charged with robbery and had a prospective juror on the witness stand, and with a knowledge of this prejudice in my mind, I asked this prospective juror whether or not he had any prejudice against a person just because he was accused of robbery or what is commonly called "hijacking." He answered that he did.

After a few more questions he was turned over to the District Attorney for further questioning and the District Attorney attempted to show that this juror had no more prejudice against the offense of robbery than any other offense. He asked the prospective juror this question. "Mr. Jones, you said a minute ago that you were prejudiced against a person charged with hijacking. Now, Mr. Jones, you have no more prejudice against a person charged with the offense of hijacking than you would if he were charged with any other offense equally as serious, for instance rape, would you?" "Yes, Mr. Erisman, I would," said the juror.

Whereupon the District Attorney interrogated him further by this question. "Now Mr. Jones, if that is true, tell the Court why you would be more prejudiced against a person charged with hijacking than you would a person charged with rape." To which question the prospective juror replied in all seriousness, "Why Mr. Erisman, I am a lot more susceptible of being hijacked." Court adjourned at this point for a recess.

Contributor: M. Neal Smith,
Longview, Texas.

Resident Counsel
AND THE
Corporate Employee

By EARL F. COOK
Company Attorney, Sylvania Electric Products, Inc.

IT IS a truism to say that corporation management is constantly studying new possibilities of making the employee feel that he is part of a social organism and not a purchased hireling. Some industries have medical staffs comprising physicians and nurses, psychiatrists, and dental attendants. Presumably these industries feel that the returns in employee loyalty and efficiency are great enough to warrant the expense. Can the company attorney, corporate attorney, resident counsel, or house counsel, as he is variously called, be used for the benefit of the Corporation's employees and yet meet the exacting standards both professionally and ethically that other lawyers and the community demand.

At the outset it must be apparent that legal services cannot be furnished to every employee as a matter of right. To do so would mean that the employer would have to maintain a staff of experts devoting much of their time to personal matters instead of corporate business.

Therefore, let us define the scope of the attorney's activity by using the analogy of the company physician, a figure more widely known than the company attorney. A very important duty of many industrial physicians is to administer first aid. After the initial treatment the patient is sent to his home or a hospital where his own physician or a specialist continues treatment. The company attorney may be made to function much the same way. Cases are frequently referred by a supervisor who says: "Jones has had something on his mind for several days. Today I told him his work was slipping and from what he says I guess he needs to talk to a lawyer for a few minutes."

With this introduction, an employee who was himself considered of potential supervisory caliber revealed that he had borrowed $2,000 on a note to a bank. His brother-in-law was a comaker and the money was turned over to the relative who lost it together with other money in a small grocery business. There was no evidence of partnership but the brother-in-law of the em-

ployee vowed that he would file a petition in bankruptcy alleging that there was a partnership unless the employee turned over to him a savings account of over $1,000. The black-mailing relative was put in place and the employee began to sleep nights and do a much better job for the company.

One company attorney has stated that he will spend ten minutes of his time on any employee's case. It is estimated that perhaps two-thirds to three-quarters of the cases can be disposed of after a brief interview. Certain types of cases, such as, criminal and domestic relations matters are not as a general rule discussed, presumably because an employee does not want his business associates to know of any matter that would reflect discredit on him.

The usual case involves business or real estate law in which fields company counsel are usually acquainted. Advice or assistance is frequently asked in tort matters, particularly automobile claims. However, the widespread practice of lawyers accepting these cases on a contingent basis encourages the employee to hire outside counsel to be paid from the proceeds of the settlement.

Practical wisdom must be applied to serve the interest of both employer and employee. After a ten minute interview with the employee counsel will know whether the employee is

able to solve his own problem or whether outside professional advice must be obtained. If this is necessary the corporate counsel should have at hand a list of competent lawyers one of whom may be selected by the employee.

In this respect it is good practice to have at least two lawyers to recommend but better still three or four so that the employee may have some freedom of choice. I do not know of any dissatisfaction by employees with lawyers recommended to them, but on the other hand in many instances the employees stated they were well pleased. The attorneys on the panel have usually called by telephone before making a charge if the work was substantial (perhaps more than $100) and reviewed the matter of the fee. This promotes mutual confidence.

Needless to say, the company attorney should not charge fees or split fees. If he does legal work on the company's time and charges employees he in effect receives payment twice for his services. An instance is recalled where a telephone message was received from a lawyer employed in a large industrial plant located in an adjacent town. Certain funds were due the estate of a deceased employee. The person making the call reported himself as a lawyer employed at the same place as the eldest daughter of the deceased. Later probate proceedings "bogged down" but after a long delay the lawyer appeared personally with certificates from the probate court in order to secure certain funds. In conversation the man handling the case confided that he earned four or five thousand dollars a year handling estate matters for employees. He said the other lawyers in the community were not very friendly. He then revealed that his employment was not legal in nature and that he was "only" a production engineer!

Fee splitting may, or may not be dishonest, but if the employee is not informed it is certainly a deceptive practice and likely to result in an abnormally large fee. The practitioner to whom the case is sent does not usually demand more than a modest fee. The kick-back on a split fee, therefore, produces an unjust result either to the lawyer who charges a fair fee in that he does not receive enough for his services, or the employee is saddled with too large a fee if the referral has a percentage price tag attached to it.

There are strong arguments against the corporate attorney who has a definite flow of income competing with a lawyer in an office downtown if he obtains such business because of his fellow-employee relationship. This is particularly true when the company lawyer handles matters for fees less than those customarily charged. In some states like Massachusetts and New York there is one lawyer for

every several hundred people so that there is an over-supply of lawyers who make their living principally in other vocations.

It is distasteful for career lawyers to compete against cut-rate, "sun-down" lawyers as they are called in Washington. There is likely to be particular bitterness when a corporate lawyer attracts business by deviating from the schedule fixed by the local Bar Association or by local custom. There might be an occasional exception. An important executive's time might be so limited that he cannot spend time in a lawyer's office and requests an associate to handle a personal legal affair, on his own time, out of business hours. Executives in the higher branches of authority, however, seldom ask for legal service so that such a case is outside the scope of this paper.

These are some of the observations made during a period of several years acting as resident counsel. So far as I know Industrial Relations groups have not made a point of offering legal service even in a limited way to employees. At least one company, however, allows a certain stipend to its company attorney as consideration for advising employees.

There are a number of obvious roads for a lawyer employed by a corporation to follow. Not being in daily contact with other lawyers he must constantly remind himself that he is an officer of the Courts and a member of an ancient and honorable guild. The lawyer's free heritage has been won from kings, tyrants and dictators and he should not lose it in the era of the corporate colossus by becoming a hireling.

Photographs

"Photographs can be most deceiving . . ."
—*Murphy, J., in Taylor v. Alabama,*
92 L ed Adv. Ops. 1394, at page 1470.

Condensed from New York History, January, 1948

The Lame, the Halt and the Celebrated

By DR. SIGMUND EPSTEIN
New York City

SKELETAL defects are far from rarities in the history of mankind or in the annals of medical history. Yet, in spite of scattered and sparse contemporary source material, and the scarcity of full-length photographs before 1900, there remains much to reward the researcher regarding the lives of some noted Americans, strong-willed men who never permitted their physical disabilities to bar them from succeeding, and their records show us how determined were their efforts to conquer in spite of them.

This paper will attempt to spotlight some of these courageous men—their surgical histories and subsequent achievements.

Thaddeus Stevens (1792–1868)

Thaddeus Stevens is an example of one whose congenital deformity warped his mental outlook so viciously that James Truslow Adams said that he was "perhaps the most despicable, malevolent and morally deformed character who has ever risen to high power in America." His tongue was vitriolic; his sarcasm deadly; and often one single sentence sufficed to lay a daring opponent sprawling. When President Lincoln urged Stevens to retract the slanderous statement that Simon Cameron, political boss of Pennsylvania "wouldn't steal a red-hot stove," "Old Thad" replied, "Glad to oblige you, Mr. President, I said I didn't think Cameron would steal a red-hot stove. I now take that back!"

Despite the fact that Lincoln admired Stevens whenever he told a good story even if it were injudicious, politically, he often placed him in disfavor. Thus Stevens never overcame his resentment of the fact that he was not appointed Attorney General at the time that Cameron was made Secretary of War. He felt that the latter appointment was due him because he was the most important Pennsylvanian, politically, at the time. From then on he became "a thorn in Lincoln's side." There was little intimacy or cordiality between Stevens and the President or his official family. But Lincoln's greatest quality was his ability to squeeze

full value from his assistants, and so he was fortunate in "having trained a wolf for his watchdog."

Every now and then, however, when Steven's fangs shot out, the Administration was in for a most uncomfortable experience until the seizure was over. Nevertheless, no one helped Lincoln more than Stevens, for during the war he concentrated all his energies on one purpose, that of winning it. An unfriendly newspaper once described him as "resolute, shrewd, unsparing; willing to use friend or foe and careless of both; possessed with his cause and that alone; and equal to every occasion." At one time when he came to the House of Representatives in the midst of a discussion as to which of two candidates was entitled to a seat, he heard a colleague say, "Both candidates are damned rascals." "Well," retorted Stevens, "which is *our* damned rascal?"

His inferiority complex (thoroughly fixed in adolescence) resulted first in timity, and later (through over-compensation) in exaggerated aggressiveness, maladjustment and violent outbursts. Thomas F. Woodley says, "Such was his nature that he harbored in his heart a fiery bitterness that approaching death did not soften." In fact, his fourteen months' active campaign for the impeachment of President Andrew Johnson, ending in a vehement and daring message, did much to hasten his death. The disappointment in failing to secure one necessary vote aggravated his illness. Yes, the very day that the "Old Commoner" made the unprecedented speech, two attendants had to carry him up the steps of the Capitol in a chair.

The inward rotation of Stevens' right foot with which he was born could never have been camouflaged unless he had been fortunate enough to have been taken care of by a qualified and skilled surgeon. Had such treatment been known and proper attention been available, he might have been spared the severe pangs afforded by the mimicry, gossip, and laughter of his playmates. That is why this sensitive and observant boy clung so closely to his mother. Strange to say, the overabundance of parental pity, instead of having a weakening effect, fired this athletically built six-footer with a flaming ambition that evidenced itself early in his voracious reading habits. (It is said that as a child he hobbled for miles to borrow a book, although it is true that he became so expert a horseman that he abandoned the saddle only when old age decreed.) He was an excellent swimmer and often boasted in his prime that he could have swum the Hellespont as easily as Lord Byron, another club-foot victim, had done. For the first time in his life, then, through his knowledge of the printed word,

he was able to be on a level with his fellows. This privilege he never forgot, for he well knew from personal experience how necessary education is in the life of a democracy. So he was a firm advocate of public schools until the day of his death. He, himself, was known as "the lame school teacher", a title indicative of the psychosocial prejudice of the public to the cripple. No wonder, then, that the inferiority complex that had eaten into the very vitals of his ego had upset his normal emotional balance, had produced a cynic with a chip on his shoulder, and had done irreparable damage. Had tolerance and magnanimity been added to his character, he might have been a brilliant, instead of a sinister figure in American history.

Alexander Hamilton Stephens (1812–1883)

"The Fighting Vice-President of the Confederacy"

Impaired kidneys and severe pulmonary disease weakened Alexander Hamilton Stephens during childhood and early manhood. Yet these troubles were unimportant to those suffered later from two accidents. In 1848 he engaged in a political brawl with Judge Cone who lunged at him with a knife, severed the tendons of his right hand, and permanently disabled it. (Hence, his illegible handwriting.) This did not deter him, however, from writing a *Compendium of the History of the Earliest Settlements to 1872*, but it accounts for his wearing heavy kid gloves at all times. It was said that at death his hands, encased in gloves, as they had been in life, were strangely birdlike.

The second misfortune occurred near his home in Crawfordville, Ga., in 1869, when an iron gate that fell upon him fractured his hip and exposed his sciatic nerve. This condemned him to crutches and a wheelchair for the rest of his life. In fact, many years after the accident, he was confined indoors. During this time he completed the two volumes of *The Constitutional History of the War* besides

Case and Comment
THE LAWYERS' MAGAZINE—ESTABLISHED 1894
AQUEDUCT BUILDING, ROCHESTER 3, N. Y.

GEORGE R. BUNDICK, *Editor*
GEORGE H. CHAPMAN, *Business Manager*

Advertising Representatives
NATIONAL PUBLISHERS REPRESENTATIVES, INC.
New York 17, N. Y., 114 East 47th Street, PLaza 3-5171 • Chicago 5, Ill., 59 East Van Buren Street, Wabash 0152 • Los Angeles 28, Calif., 6605 Hollywood Blvd., Hempstead 3171.

¶ Case and Comment is published bi-monthly by The Lawyers Co-operative Publishing Company, Rochester 3, New York, and Bancroft-Whitney Company, San Francisco 1, California. The publishers are not responsible for the personal views of the authors of signed articles. Their publication is not to be deemed an indorsement of any position taken on any controversial question.

teaching the principles of law to a half-dozen disciples. In 1873 he was elected to Congress, although there is no record that he did active campaigning. However, in 1874 despite constant pain, he delivered his first speech outdoors in twelve years. He came forward limping on his crutches, and "leaning on a desk provided for that purpose, he delivered a lengthy address." When in 1875 he was elected to Congress, he took the oath in his wheel-chair. In 1876 a newspaper correspondent said, "If he were to draw his last breath any instant, you would not be surprised. If he were laid out in his coffin he needn't look any different. Only the fires would have gone out in those burning eyes. . . . That he was here, though, to offer the councils of moderation and patriotism proves how invincible is the soul that dwells in this shrunken and aching frame. . . . The great rebel of Georgia, with the very shadow of death upon his face, lifted his failing voice in behalf of moderation and peace."

The Lawyer's Version of the First Psalm

By LOUIS LANDE, Washington, D. C.

Happy is the lawyer who hath not counselled the wicked,
Nor guided the way for sinners,
Nor sat in the seat of the wrongdoer.
But his delight is in the law of the land,
And on the law doth he meditate all his days.
He shall be as a tree that is upright,
Which bringeth forth fruit that is ripe and wholesome,
And whose labors are mighty and successful.
And whatsoever causes he undertaketh,
He pleadeth with eloquence and learning.
Not so the erring and easy going,
For they labor in vain,
The fruit of their efforts is unripe and sterile.
From which Justice turneth away and punisheth.
Therefore they shall not be victorious in Judgment,
Nor be welcome in the assembly of their brethern.
For the Law regardeth the righteous with pleasure,
But the way of the transgressor is hard.

Across the years of time....

Seventy-five years ago this company was founded.

It started at the bottom of the so-called railroad panic.

It went through the Sioux Indian War of 1877, the Spanish-American War of 1898, World War I and World War II.

It outsmarted the Gold Panic of 1893, the Money Panic of 1907, the Deflation of 1921 and the Great Depression of the thirties.

Then there were the economic changes when the railroads superseded the canals; when the airways and the highways began to close in on the railroads.

There was the change from horse-drawn to motor-driven vehicles; electricity superseded steam; electric lights took the place of oil lamps; radios replaced the gramophone.

Today, as in 1873, the activities of Shepard's Citations reflect an alert recognition of current problems. Shepard's Citations will be even more "Indispensable" in 2048 than in 1948.

Shepard's Citations

Colorado Springs
Colorado

The Trial at Bell Mountain

By AXEL P. JOHNSON of the Reno (Nevada) Bar

BELL MOUNTAIN township is located in a remote deer, antelope and grouse section of a sparsely settled far western state. The drama was laid in the melodramatic prohibition era. Crime had rarely, if ever, reared its ugly head in Bell Mountain township. The Volstead Act, which had not appreciably quenched the thirst of hardy western folk, was only incidental to the matter which was to engage attention of his Honor, the Justice of the Peace, who, in that section was the embodiment of the law and dispenser of justice.

Almost unnoticed, one gangling and shiftless Bill Estes had moved into the sagebrush wilds with a new wife, built a small cabin and set his traps for coyotes and other predators, as a means of livelihood. His abode was 20 miles from any other habitation and only trails led from one homestead to another. In a year or so Bill began clearing a patch for farming. Simultaneously various farming implements began to disappear from the premises of numerous other settlers thereabout. The climax came when one night a hundred yards of wire fencing vanished from the posts surrounding a field, and law was called in to solve the mystery. After some skirmishing around the countryside in his jalopy, the constable located numerous of the missing articles on the premises of Bill Estes.

Immediately a warrant was procured charging petty larceny. The defendant was brought before his Honor, the Justice, entered a plea of not guilty and demanded a trial by jury. In the absence of a jail, the court released him upon his own recognizance to appear on the date of the trial, three weeks hence.

The constable after two weeks and a thousand miles of travel along devious trails had summoned a jury panel. The summoned citizens, good and true, arrived in nondescript vehicles early the day of the trial; farm wagons, jalopies and by horseback. Though hardly a judicial accoutremont, every prospective juror brought a full gallon of moonshine whiskey. Through some quirk of psychological spontaniety, this was evidently to be a Roman holiday.

The assemblage converged upon the tiny frame dwelling of his Honor, and it was only too evident that the judicial forum was wholly inadequate.

"We'll hold court in the corn crib," announced his Honor.

By this time the gallon jugs of whiskey were ensconced in a neat row behind the improvised courtroom. Sunday debris was removed from that sprawling structure, and boxes and planks provided in lieu of judicial fixtures and eventually the jurors summoned for service. The remaining women departed for the house apparently upon a mysterious, secret mission.

The Justice carefully affixed his glasses to the bridge of a tanned and leathery nose, read the charge and, in a stentorian voice called the defendant. No response. It then dawned upon the assemblage that there was present no defendant, and no one to represent said defendant.

"Mr. District Attorney," droned his Honor, "what do we do?"

"Consult the statutes, your Honor."

The volume contained a statute apparently covering the case.

"Gentlemen," from the Court, "this statute says that if a defendant in a misdemeanor case has once personally appeared in Court, further proceedings may be had in his absence. The case will proceed."

The jury was selected, sworn, the opening statement presented, and the witnesses paraded to the box. There was, of course, no defense. But no jury trial would be a complete success without an oratorial climax, and accordingly the acoustic qualities of the corn crib were put to a severe test. The Court asked the jury to retire to deliberate. One of the jury arose and solemnly intoned:

"Would the Court and the district attorney join us in some refreshments behind the corn crib?"

The jugs were hoisted by the index finger to the crook of the elbow and gurgled. In due time the jury was permitted to deliberate in the absence of the Court and counsel.

Reaching its verdict and returning to the crib, the foreman drawled:

"Guilty as Hell!"

The Court: "Gentlemen, I thank you. Its dinner time and we'll all go in and eat."

Fried chicken, biscuits, fresh honey from the hives and spirits enlivened the festive occasion. The case discussed freely, congratulations were bestowed upon the talesmen and a prediction made that the defendant would never again appear.

A week later, back at the office

in the County Seat, the secretary announced to the Prosecutor: "A Mr. Bill Estes to see you."

A lean, lanky individual entered.

"I'm Bill Estes," he said. "I come down har to do my time."

"What time?"

"My six months"

"How do you know you got six months? You weren't at the trial."

"Nope, but I stopped in to the postoffice and the missus thar tol' me that the judge guv me six months."

"Have you got the commitment papers?"

"I ain't got no papers. I hitchhike part the way and walked the rest and I ain't a-goin' back 200 miles to git no papers."

"Tell me, Bill, why didn't you come to the trial?"

"Wal, my car she broke down in the desert and I figger they'd hook me anyways so I don't show up."

"Why are you so anxious to go to jail?"

"Wal, to tell you the truth, trappin' ain't been so good and winter's a-comin' on, my wife's a-goin' to have a kid so I jes figgered the County would take care a her while I was in the jug and nex' spring I'd a-start all over again."

"Well, Bill, you're not going to jail. You're going to move out of Bell Mountain, get a job, support your wife and behave yourself."

And Bill did.

Easy Divorces

"Only fragments of a social problem are seen through the narrow windows of a litigation . . . We cannot close our eyes to the fact that certain States make an industry of their easy divorce laws, and encourage inhabitants of other States to obtain 'quickie' divorces which their home States deny them. To permit such States to bind all others to their decrees would endow with constitutional sanctity a Gresham's Law of domestic relations. Fortunately, today's decision does not go that far. But its practical result will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it."

—*Frankfurter, J., in Sherrer v. Sherrer,* 92 L ed Adv. Ops. 1055, at pages 1071, 1072.

The Work of a Grievance Committee

By MILTON J. KEEGAN
of the Denver (Colorado) Bar

Condensed from Dicta, November, 1947

AMONG the unsung servants of the profession are those who are drafted to serve on the Ethics and Grievance Committee. The very important work of that committee is twofold. However, since over 90% of the complaints have no merit and nearly all of the few having some merit involve only minor infractions of the code of ethics, requiring no drastic action, the bulk of the work of that committee is screening out complaints having no merit and disposing of them and those involving minor infractions of the rules without publicity, so that the attorney involved will not have his reputation ruined.

As those of you who have served on that committee know, when a complaint is made against an attorney—no matter how unjustified the complaint is or how perfect the lawyer's defense may be—the lawyer complained against always approaches the Grievance Committee with that happy zest of a man about to be pushed over Niagara Falls in a leaky barrel.

There is no place on *any Grievance* Committee for witch-burners. Many years ago, when I first became chairman of the Denver Bar Association Grievance Committee, there was a rumor that prior local and state grievance committees and the Supreme Court had not always seen eye to eye. I went to the then chief justice to find out what the trouble had been. I gathered that it had been due to the fact that some Grievance Committee members had been a certain type of crusader—one who redoubles his efforts and loses sight of his purpose. In the many years I got stuck as a member of the Denver and Colorado Grievance Committees, the co-operation between the Supreme Court and the committees could not have been better. During many of those years, Judge Orie L. Phillips was chairman of the American Bar Association Ethics and Grievance Committee, and he was of great help to the committees on close and difficult problems.

During the years I served as chairman of the Denver and Colorado Bar Association Ethics and Grievance Committees, our young receptionist told me it wasn't long before she could spot a grievance committee complainant clear down the hall the minute he or she stepped off the elevator. I recall one woman who had held quite impressive execu-

tive positions with several large institutions. She had been in an accident, had sued, was dissatisfied with the outcome, wanted her attorney, the opposing attorney, the trial judge, and the Supreme Court judge who wrote the opinion on appeal, all disbarred. She had followed the usual routine—complained to the district attorney, the F.B.I. and, I believe, the governor, who had all told her to go to the Grievance Committee. I knew I would have to hear her out. While she explained at great length her injuries and her bad luck in her case, she kept taking out her glass eye and holding it in her hand to emphasize the extent of her injuries. I listened with my very best poker-face judicial expression—but I didn't fool her at all.

Suddenly she stopped and said: "I can tell by the way you look at me that you think I'm crazy. Well I'm not and I can prove it!"

She reached into her large handbag and got out a bundle of papers—discharges from five different insane asylums. She insisted that I read each one

"Forty dollars a week alimony—but he makes forty-five!"

It's Different

THIS MOST COMPREHENSIVE SINGLE-VOLUME WORK IN MANY YEARS

CLARK'S SUMMARY *of* AMERICAN LAW

WITH INTRODUCTION BY
DEAN ROSCOE POUND

- Thirty-one subjects covered.
- The quickest source of refresher information.
- A sure way to ALR annotations, American Jurisprudence, and hundreds of law review articles in fifty-one law reviews.

Priced at only $7.50 it received instant demand. -:- If you have not ordered your copy of this book send us your order today.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
Rochester 3, ***New York***

where it said that in their opinion this woman is not insane and that they believed it is now safe for her to be at large.

I said: "Well, you do seem to have quite a bit of proof here."

And with an air of triumph she arose and swished out of the office, never to be heard from again.

I do not want to leave the impression that she was a typical complainant—because *she* never came *back*. So many of them come back *again*, and *again* and *again*, and when the committee refuses to take action go home and write you insulting and threatening letters.

Many complainants are perfectly sane but from financial pressure or just plain greed they want to get back a $25.00 or $50.00 attorney fee, and seem perfectly willing to wreck an attorney's reputation without any justifiable reason if they can make or save a few dollars for themselves. Some collection agencies, after sending an uncollectible account to a local attorney and asking for several status reports, seem to then write the Grievance Committee as a matter of routine in the hope they can get the committee to scare the attorney into working harder on the collection.

The members of every Grievance Committee should always be exceptionally fair-minded with very good judgment, and of such caliber that there will be no excuse for anyone to try to short-circuit that committee and go direct to the Supreme Court with their grievances. Once it gets to the Supreme Court it is almost impossible for that court not to make it a matter of public record available to the newspapers. Perhaps there should be a right of appeal to the Supreme Court from a decision of the Ethics and Grievance Committee holding a complaint has no merit. However, since so many of the complaints have no merit, perhaps the association and the Supreme Court should make screening by the Grievance Committee compulsory before the complaints can be filed in the Supreme Court and become matters of public record available to the newspapers. Then if the complaint must be released to the press, the finding by the committee that it is without merit should be attached and simultaneously released.

Mother of Precedents

Judge: "Is there any precedent for that statement?"
Counsel: "Yes, your Honor, the mother of all precedents—the Common Law."
Judge: "Is she not too old to bear a child?"
Counsel: "With your Honor's assistance, I am certain that her fertility can be established."

Announcing a new

Annotated Digest of U. S. Supreme Court Reports, Lawyers' Edition

with the following special features:

1. Wherever a point contained in a paragraph has been in any way overruled, distinguished, limited, questioned, or otherwise explained in any subsequent decision of the Supreme Court, that fact is noted in the digest of the case.

2. Material in dissenting and separate opinions is digested for the first time in any digest.

3. References to Am. Jur. and to A.L.R. annotation material open up a wide source of investigation.

4. A new and improved scope section greatly increases the ease with which this digest can be used. This gives information both as to excluded and included material. This directs the user to the place where excluded matter is treated.

[*Owners of the former L. Ed. Digest will be granted generous allowances.*]

WRITE US TODAY FOR FULL INFORMATION

The Lawyers Co-operative Publishing Co.

ROCHESTER 3, NEW YORK

Sec. 562 P. L. & R.
U. S. POSTAGE
PAID
ROCHESTER, N.Y.
PERMIT NO. 12

POSTMASTER—*If undeliverable as addressed for any reason, notify sender stating reason on Form 3547, postage for which is guaranteed by The Lawyers Co-operative Publishing Co., Rochester 3, New York*